OAH Docket No. 8-1700-8339-2
DHR File No. ER 19920745

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Gloria Ferraro,

Complainant,

v.

Chisago County and Chisago County Sheriff's Department,

Respondents.

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde on July 26, 1994, at the Office of Administrative Hearings in Minneapolis, Minnesota. Both parties agreed to have the hearing in Minneapolis. The hearing was completed on July 28, 1994. It was limited to liability issues. Damage issues were bifurcated at the parties' request. The record closed on August 30, 1994, when the last authorized brief was received.

Donald E. Horton and Leslie E. Scott, Horton and Associates, Attorneys at Law, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401-2402, appeared on behalf of Complainant. Lawrence R. King and Therese M. Pautz, Attorneys at Law, King & Hatch, P.A.; Suite 800, St. Paul Building, Six West Fifth Street, St. Paul, MN 55102; appeared on behalf of Respondents.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of t Department of Human Rights or any other person aggrieved by this decision ma seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are whether the Respondents discriminated agai Complainant in her employment on the basis of her sex, sexually harassed the Complainant and retaliated against the Complainant after she complained abou sexual discrimination and harassment in violation of Minn. Stat. § 363.03, subds. 1(2)(b) and (c) and 7(1) (1990).

Based upon all the files, records and proceedings herein, the Administrati Law Judge makes the following:

FINDINGS OF FACT

1. In October 1988, Gloria Ferraro (formerly Gloria Timermanis) begar working for Chisago County as a part-time, on-call bailiff at the courthouse Center City, Minnesota. As a bailiff, she was not required to work a speci schedule. She had the option to accept or reject work when called by the co administrator's office. Her flexible work schedule met her needs as a sing parent attending college. At most times material to this case, she was a fu time college student. Her ultimate goal was to obtain a Ph.D. in psychology

2. On December 11, 1988, Ferraro was asked to transport a mentally il female from the County jail to a security hospital in Moose Lake for the Sheriff's Department. Ex. 108. She accepted and made the transport. Afterwards, a field training officer (FTO), Sergeant Tom Gustafson, asked Ferraro if she was interested in other transports for the Sheriff's Department. She told him she was interested and completed necessary trainir in February 1989. When her training was completed, she started transporting inmates for the County as the need arose. She was a part-time transportatio officer (transporter) without fixed working hours. She was called to work w needed and could decline to work if she chose. Before becoming a transporte Ferraro did not complete a job application or go through an interview proces

3. The Chisago County Sheriff's Department and the Chisago County Jai are located in Center City, Minnesota. A jail administrator is responsible the operation and management of the jail. Prior to December 31, 1991, Lieutenant Thomas Alvin, a deputy sheriff, was jail administrator. He was replaced by Lieutenant Roger M. Kaske.

4. The jail facility contained a secured cellblock area, a communicat /dispatching area and a booking area. Prisoners were supervised and monitor by custodial employees called correctional officers or jailers. Full-time jailers had regularly assigned shifts. Part-time jailers worked for them or weekends and during vacations, illnesses, or other absences from work. One two jailers worked on each of five, overlapping, daily shifts. Jailers were responsible for contacting on-call transporters when their services were needed.

5. At all times material to this case, the jail was a 21-bed facility It housed only adult male inmates for periods up to one year. The jail also had two holding cells. They were used for persons waiting to be booked, interrogated, transported to another facility, or taken to court. Women, juveniles, inebriates, and the mentally ill were always transported to anoth facility.

6. Inmates generally were moved by transporters. Although transporte
wore uniforms nearly identical to those worn by deputy sheriffs, they were n
deputy sheriffs and carried no weapons. However, they commonly carried and
used handcuffs. All prisoners except the mentally ill were required to be
handcuffed in transit.

7. The County employed both regularly-scheduled, full-time transport officers and part-time transport officers who worked when the regulars were absent or when a need arose. The County had no official job description for transport officers. For payroll purposes, they were treated as jailers and paid at the same rate.

8. Ferraro began transporting prisoners in February 1989. The follow month, Gene Hill was hired on as an on-call jailer and transporter. He initially applied for that position on November 5, 1988. Ex. 101. Like Ferraro, Hill was a full-time college student when he was hired. He remaine student until March 1992. In April 1989, Kenton Johnson also was hired as a on-call jailer and transporter. The record does not show when he initially applied for that position.

9. During 1989, Ferraro worked 249.75 hours; Hill worked 783.75 hours and Johnson worked 581.58 hours. Ex. 12.

10. Many of the part-time transport officers also worked as jailers. Ferraro liked being a transport officer and, like other part-time transport officers, she wanted more work. Generally speaking, however, she was only called to transport women. Prior to August 1, 1992, the Sheriff was require to provide all prisoners moved more that 25 miles with a custodial escort (transporter) of the same sex as the prisoners. Minn. Stat. § 631.412 (1990 After August 1, 1992, the distance was increased to 100 miles. Minn. Laws 1 c. 417 § 1.

11. In July or August 1989, Ferraro asked Alvin if she could work in t jail. He told her he had no need for her at that time. Nonetheless, in Jun 1990, William A. Houston, Thomas Larson, and Richard Wright were hired as o call jailers and transporters. Those positions were apparently advertised o or about February 1990 when Wright applied. Ex. 102. When Ferraro saw the advertisement for the jobs the three men later got, she went to Alvin again discuss working in the jail. He told her he would get her into the jail but that he still needed more help.

12. After Houston, Larson, and Wright were hired, Ferraro once more we to Alvin to discuss work in the jail. He told her the Sheriff didn't want women in the jail but if a new sheriff was elected in November there would b no problem. In the November election, a new sheriff was elected. Soon afte the election, Ferraro went to Alvin to discuss her working in the jail. At that time he agreed to start training her for work in the jail.

13. In 1990, the number of hours worked by Ferraro and the recentlyhir males who worked as on-call jailers and transporters were as follows:

NAME	HOURS

Ferraro	658.50
Hill	1,257.75
Houston	850.00
Johnson	1,116.86
Larson	359.50
Wright	1,011.25

Ex. 12. Larson was hired on a seasonal basis. He only worked during the winter. In December 1990, Hill and Wright became permanent full-time jailer but continued to work as on-call transporters.

14. In July or August 1989, Ferraro told Gene Bourasa, a jailer, that wanted to transport more male prisoners. Bourasa told her it was illegal fo her to transport them, and Ferraro went to Alvin to validate Bourasa's statement. Alvin told her that she legally could transport males and said t he would inform the jailers to let her do so. Nonetheless, Ferraro was not called to transport males for over 1 years. After December 1990, she was allowed to transport males when no male transport officers were available. general jailhouse policy was to have males transport males and female transp females. Wright Testimony.

15. In November 1990, Ferraro also discussed her desire to transport m males with Paul Carlson, who was a full-time jailer and F.T.O. Carlson tol her that she needed prior approval from Alvin to transport males even though male transport officers didn't need such approval. Ferraro didn't discuss Carlson's statement with Alvin.

16. On November 29, 1990, Ferraro began her training as a jailer. At that time, three jailers were authorized FTOs who could train her: Paul Carlson, Kurt LaValla, and Roger Loman. Carlson didn't think women should w as jailers, but he began Ferraro's training as Alvin directed. However, Ferraro's training was limited to shifts 1-3. Carlson and Alvin decided tha Ferraro wouldn't be trained for the "high risk" periods covered by shifts 4 5[1]. Ex. 29. Ferraro received training on November 29, December 16, and December 29, 1990. Ex. 110. Thereafter, training abruptly stopped. She wa scheduled for training several other times, but Carlson had her do other, filing work instead. Ferraro's training apparently was never finished, but FTOs had different opinions on that matter. Carlson thought she hadn't completed training, but LaValla thought she had. County records show that s had a significant amount of training in 1990--at least 120 hours. Ex. 31. Further, they show that she received nearly as much, if not more training, t Houston, and significantly more training than any transporter or jailer exce Houston and Johnson. Id.

17. In 1990 and 1991, jailers were required to have forty hours' orientation training before they could work in the jail without supervision In addition, during the first year as a jailer, jailers were required to hav an additional eighty hours' general training so the County could retain its accreditation from the American Academy of Corrections. However, the requirement for 40 hours' training before working in the jail without supervision wasn't always followed. Thomas Larson, who began working in the jail in the fall of 1990, didn't complete his training until 1993.

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1. Shift five ran from 11 p.m. to 7 a.m. From Thursday through Saturday, efforts were made to have two jailers on duty during this shift.

18. In 1991, Ferraro only worked in the jail six times. Ex. 127. Periodically throughout the year she asked Alvin for more time. He promised more hours, but none were ever offered. During the period from 1988 to 1992 the jailhouse policy was to have jailers of the same gender as the jail's inmates. Carlson Testimony. Because the Chisago County Jail only housed adult males, male jailers were used as much as possible. Before she began her jailer training, Ferraro asked Bourasa and Britt Downs, the jail's program coordinator, if women ever worked in the jail. They told her that there had been a couple and they were glad they were gone. Complainant inferred that they didn't want women working in the jail.

19. In 1991, the total hours worked by Ferraro and the male transporters and jailers were as follows:

NAME	HOURS
Ferraro	506.25
Hill	1,673.50
Houston	1,703.00
Johnson	680.08
Larson	260.75
Wright	unknown

Ex. 12.

20. In 1979, the Chisago County Jail Operations Policy Book contained, among other things, a job description for jailers. It stated that "FEMALE JAILORS WILL BE RESPONSIBLE FOR FEMALE PRISONER CARE ONLY." Ex. 11 at 6. In about 1986, the job description was amended as part of the County's comparable worth study.[2] When amended, the quoted language was deleted.

21. The number of transports necessary on any given day was unpredictable. Only half, at most, were scheduled in advance. Most transports were to the courthouse, but they could be made anywhere in the state. Usually transports involved distances less than 100 miles. Only 20 to 30 percent of the prisoners transported were women. Transports could occur at any hour and had to be handled promptly so the holding cells would be available.

22. Alvin received frequent complaints from part-time jailers/transporters regarding the amount of work they were offered and their desire for more. Ferraro had expressed similar concerns. However, Ferraro's complaints were different because she told Alvin that the work was not being fairly distributed. She didn't merely complain about not getting enough work

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2. The comparable worth study apparently was undertaken pursuant to the Minnesota Pay Equity Act, Minn. Stat. §§ 471.991-471.999, which was initially enacted in 1984. The statute was enacted to eliminate sexbas disparities in the compensation paid to the employees of political subdivisions. More specifically, it addresses sex-based wage disparit between members of male-dominated versus female-dominated classes. Armstrong v. Civil Service Commission, 498 N.W.2d 471, 476 (Minn. Ct. A 1993), rev. den. May 28, 1993.

23. On July 25, 1991, Ferraro wrote to Alvin about her hours. In her let she mentioned her prior complaints about work distribution and stated that s should be able to work as many hours as Bill Houston and Kenton Johnson, part-time jailers/transporters. She questioned why she didn't get more regu transport work and stated her desire for more work during the day, which usually involved longer transports. Ex. 5. At this time, Ferraro was not taking classes. Ex. 104.

24. In response to Ferraro's July letter, Alvin developed a telephone log. Jailers were expected to call transporters on a rotating basis using a separate list of transporters and enter the names of those persons called on the log. When a jailer called a transporter, the jailer was to look at the last person listed in the telephone log and call the next person on the transporter list. After the system was implemented, transporters still did receive an equal number of calls. Jailers sometimes went out of order and called transporters they knew were available. Also, jailers might assign a transport to a volunteer who was present when the need for a transport arose

25. After Alvin received Ferraro's July 25 letter, Alvin told her he would make the jailers aware that she wanted work, that she was competent, t she could transport males other than high risk inmates, and that he had confidence in her.

26. During 1990 and 1991, there were eight full-time jailers: Kurt LaValla, Britt Downs, Paul Carlson, Gene Bourasa, Eric Nelson, Roger Loman, Richard Wright, and Gene Hill. During the same period, there were approximately ten part-time jailers/transporters. Ex. 31. However, only th of them worked regularly as jailers and transporters: William Houston, Kent Johnson, and Complainant. Thomas Larson also worked regularly, but only in winter. The total wages earned by the regular, on-call transporters betwee 1989 and 1991 were as follows:

TOTAL WAGES

NAMES / YEAR	Ferraro	Houston	Johnson	Larson	Hill	Wright
1989	$4,803.50	$0	$ 9,727.29	$ 0	$ 3,312.30	$0
1990	7,538.29	8,253.51	18,112.13	3,429.26	17,263.74	9,673.60
1991	5,073.98	17,801.29	13,381.82	2,633.58	23,042.77	21,734.20

Ex. 12. In 1991, Ferraro got two different W-2 forms. One lists wages of $2,815.39, and the other lists wages of $2,258.59. Other jailers/transporte

only have one W-2 form. Ex. 145. There is no evidence explaining why two W
forms were issued and no evidence of a mistake or duplication.

27.The hours worked as jailers or transporters by Hill, Wright, Larson
Complainant between June 11, 1991 and February 16, 1992 were as follows:

TRANSPORT HOURS

2-Week Period Beginning	Ferraro	Hill	Wright	Larson
6/11/91	48			
6/25/91	34.5			
7/ 7/91	23.25		1.0	
7/21/91	15.75			
8/ 4/91	35.25			
8/18/91	36.5	5.0	2.0	
9/ 1/91	11.0			
9/15/91	5.5			
9/29/91	4.0			
10/13/91	4.5			
10/27/91		15.25		
11/10/91	24.75			
11/24/91				2.5
12/ 8/91	10.5			13.0
12/22/91	14.25	2.0		21.5
1/ 5/92		8.5		13.0
1/19/92		17.75		31.0
2/ 2/92	7.5	18.0		36.0
2/16/92	8.5			19.5

JAIL HOURS

6/11/91		68.0	80.0	
6/25/91	8.5	25.75	75.75	
7/ 7/91		28.25	78.5	3.5
7/21/91	8.5	25.25	75.5	
8/ 4/91		25.5	73.5	
8/18/91	8.5	17.00	79.5	
9/ 1/91		17.00	59.5	
9/15/91		33.25	86.0	
9/29/91		25.5	73.0	
10/13/91		14.0	63.0	
10/27/91		42.5	61.5	
11/10/91		51.0	80.0	
11/24/91		50.25	90.0	
12/ 8/91		53.5	60.0	
12/22/91	8.5	23.5	54.5	
1/ 5/92		17.0	43.0	35.0
1/19/92	14.5	4.0	98.0	
2/ 2/92		59.5	43.0	17.50

2/16/92	17.0	34.0	85.0	25.5

Exs. 127, 132, 133, 134.

28. On December 18, 1991, Ferraro wrote to Alvin about her job hours, among other things. She sent a copy to Kaske because he was taking over Alvin's job at year's end. In her letter, she asked to be scheduled in the jail as regularly as Kenton Johnson and Bill Houston. In addition, she aske

to be scheduled for the same number of daytime transports as Houston and Johnson. She went on to note her school schedule and asked that her working hours be scheduled around her classes. Ex. 6. At the time of her letters, Ferraro was enrolled in three classes totaling eight credit hours at St. Mar College in Minneapolis. Ex. 104. Beginning January 7, 1992, Ferraro was in class from 1 to 4 p.m. on Tuesdays and from 9 a.m. to 12:15 p.m. on Wednesda and Thursdays. Ex. 6.

29. On December 27, 1991, Ferraro met with Kaske to discuss her Decemb 18 letter. At the meeting, Ferraro complained that she was not getting the same number of hours' work as male jailers. Kaske told her she got less hou because she needed more training. When she asked him what training was need Kaske summoned LaValla to the meeting. LaValla told Kaske that Ferraro had necessary training but the other jailers didn't feel safe working with her. that point, Kaske told Ferraro that for a fifty percent cut, he would help h file a lawsuit against the County because "they're fucking you over." Kaske laughed. Ferraro didn't, and the meeting temporarily became more serious.

30. At the meeting Kaske told Ferraro to order some more uniforms for jail work. She said she couldn't because the pants, which were made for men didn't fit her. Kaske responded by stating: "So you're saying you can't get Kurt's [LaValla's] pants?" Ferraro didn't respond, and LaValla said the Department could now order female uniforms. Following that, scheduling was discussed. Kaske told LaValla to make sure the hours were evenly divided an told Ferraro to wear her pager. Ferraro agreed to that, and the meeting end

31. Following her December 18, 1991 letter, Ferraro had a transport on December 27 and worked in the jail four times: December 29, 1991; January 2 and 26, 1992; and February 17 and 29, 1992. She had three more transports through February 29. Ex. 127. On January 8, 1992, LaValla asked Ferraro if she would be interested in working the 3rd shift in March, April and May whe Hill was on leave. He also asked her if she would be interested in working 5th shift alone. Ferraro said she would work for Hill but wanted more train and experience before working the 5th shift alone. They agreed that Ferraro would come in for training/work during the 4th shift on January 25 and 26. February 26, LaValla told Ferraro she was scheduled to work in the jail on March 20 and would be working for him some other days in March when his shif needed to be filled. The next day, when Ferraro checked the March schedule, all the shifts for LaValla and Hill had been assigned to males.

32. Late in January 1992, Ferraro sought legal counsel to help her get more hours. Subsequently, her attorney wrote a letter to the County Attorne stating that Ferraro had been discriminated against and sexually harassed. February 29, Kaske talked to Ferraro on the telephone when she answered a ca he made to another jailer. Kaske told her that he had received a call from County Attorney the day before stating that Ferraro had filed a lawsuit alleging sexual harassment and discrimination. Kaske asked her what it was

about. Kaske also told her that he understood a supervisor had been named a harasser and asked if the reference was to him. Ferraro told him the letter was self-explanatory and that she didn't feel comfortable discussing it beca her attorney advised her not to. Ferraro told Kaske she hoped the matter co be resolved, and Kaske said he was going to check the work records.

33. On March 2, 1992, Ferraro was called to make a transport. When sh arrived at the jail, Kaske was present. He immediately began "firing" questions to her about what was happening and whether she had taken the rece

call-out logs which were allegedly missing. He asked her how she expected h to investigate her problems if she wouldn't talk to him. Kaske was somewhat angry and raised his voice. She told him she would talk about the future bu not the past and left to prepare for the transport. While preparing, Kaske returned with a blue book in his hands and began reading a law or regulation which, in his view, prohibited women from working in an all-male facility unless another male was present. As she left to get her transport, Kaske to her he didn't create this mess but walked into it.

34. When Ferraro completed the transport she broke down and decided to quit. The next day, her attorney informed the County Attorney not to schedu Ferraro for any work until her discrimination charges were resolved. Kaske, 7/15/94 Deposition, Ex. 2. Based on that letter she has not worked for the County again.

35. During the course of her employment, a number of male employees ma comments Ferraro found offensive. Downs told a male inmate Ferraro was cuff for transport: "At least you get a pretty women to transport you." On anoth occasion in February 1992, Downs told Ferraro in the presence of an inmate t if the weather is bad, "you can sleep with the guys in work release." Ferra felt that Downs comments were degrading and disrespectful and could put her risk.

36. On December 28, 1991, during an in-service training session attend by approximately fifteen employees. Downs made an offensive sexual gesture At the time, the instructor was discussing "pat downs" and advising those present to use the backs of their hands near a prisoner's genital area. Dow said he knew how to pat down females, and extended his palm outward in the a with only his middle finger extended. All the men laughed.

37. Employees frequently had problems with the fit and tailoring of th uniforms. On one occasion, Downs and Bourasa questioned Ferraro's uniform. One of them asked her why her badge didn't lay flat and why the flag on her shirt was higher than theirs. Both laughed. Ferraro felt that she was beir singled out for ridicule due to her sex.

38. On January 25, 1992 Ferraro was in the library room used by prison during the day. Houston and Eric Nelson, a full-time jailer, were in the ro watching television. The program they were watching prompted Houston to say "You can't trust a woman." Nelson responded by saying: "Did you hear that Lori?"

39. Houston had the habit of using the word "fuck" or some variant. January 25, 1992, Ferraro asked him not to use it when she was around. He didn't stop. It seemed to her that he used the word more after she asked hi not to use it.

40. On one occasion when working as a transport officer, Kenton Johnso a part-time jailer and training officer, was working with Ferraro. During t time, Johnson asked her if she was getting enough sex. His remark was out c context and made her uncomfortable and intimidated.

41. In August 1991, Ferraro moved from North Branch to Forest Lake and for awhile, she spent time at both places. Kaske heard about the change and asked Ferraro about it one day. When she explained her situation he respond

by saying, "So basically, your shacking up." Two other female employees wer present. Ferraro felt degraded by his statements. To her, he was implying that she was a whore or a slut.

42. On January 3, 1992, Ferraro and Houston did a transport together. When they returned to the jail, Houston asked LaValla where Rick was. LaVal said: "I don't know. He's probably somewhere banging on his dick." Ferra pretended she didn't hear the comment.

43. After his meeting with Ferraro on December 27, 1991, Kaske instruc LaValla to try and even out the hours worked by part-time employees. Kaske also changed the call log to reflect the identity of the person making each entry, and he asked Carlson for a report on Ferraro's training and qualifications to work as a jailer. On March 3, 1992, Carlson wrote a memo Kaske stating that Ferraro was not ready to work in the jail without supervision or on "high-risk shifts." Carlson stated that she should be retrained in the tasks she had been trained in before. Ex. 29.

44. During the course of her employment, Ferraro didn't receive performance evaluations. Other on-call transporters and jailers like Wright Houston, and Johnson received them. Also, deductions for the Public Employe Retirement Association retirement fund was not taken from her payroll checks However deductions were taken for Wright, Larson, Johnson and Houston.

45. After her training as a jailer initially started, Ferraro asked Al if she would get the additional equipment she needed to be a jailer. He to her she would. However, Ferraro was never given her own pair of handcuffs. Most jailers had received handcuffs from Alvin, but extra handcuffs were readily available to her in the jail and in transport vehicles.

46. On August 20, 1987, Chisago County adopted a sexual harassment policy. Ex. 30. The policy was included in a policy and procedures manual usually given to new employees. The policy contained detailed procedures fo reporting harassment. Ferraro saw the policy when she first was being train to work in the jail, but she never complained about harassment to her supervisors or followed the procedures set forth in the sexual harassment policy until late February 1992. The sexual harassment policy contained a definition of harassment, but none of the employees Ferraro regularly worked with received any sexual harassment training from the County.

47. On December 16, 1992, Complainant filed a discrimination charge against the Respondents with the Minnesota Department of Human Rights. Her charge was subsequently referred to the Office of Administrative Hearings pursuant to Minn. Stat. § 363.071, subd. 1a.

48. Following Ferraro's July and December 1991 letters, neither Alvin Kaske undertook any inquiry to determine if male transporters or jailers wer

being offered more opportunities to work because they were men, but they bot
took some steps to ensure equal working hours for transporters.

Based upon the foregoing Findings of Fact, the Administrative Law Judge
makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the Complainant's charges under Minn. Stat. §§ 363.071, subds. 1a and 2 and 14.5 (1992).

2. The Respondents received proper and timely notice of the Complaint and the issues involved in this proceeding.

3. The Notice of and Order for Hearing was proper in form, execution content.

4. The Respondents are "employers" as defined in Minn. Stat. § 363.01 subd. 17 (1992).

5. The Complainant has the burden of proof to establish the charges n against the Complainant by a preponderance of the evidence.

6. Analysis of the Complainant's charges of discrimination must follo the three-part format set forth in McDonnell Douglas Corp. v. Green, 411 U.S 792 (1973). See, e.g. Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (1986

7. Complainant established, by a preponderance of the evidence, that was discriminated against on the basis of her sex by the Respondent's practi and policies in assigning work to her as a transporter and a jailer.

8. Complainant failed to establish, by a preponderance of the evidenc that she was sexually harassed by Respondents' employees.

9. Kaske retaliated against the Complainant for opposing discriminato practices in violation of Minn. Stat. § 363.03, subd. 7 (1990).

10. Complainant failed to establish that she was constructively discharged from her employment due to intolerable working conditions.

Based upon the foregoing Conclusions, and for the reasons set forth in accompanying Memorandum,

IT IS HEREBY ORDERED:

1. Additional hearings will be scheduled to consider the appropriate damages and other relief which should be ordered as a result of Respondent's discrimination in the terms and conditions of Complainant's employment and i reprisal.

2. The Complainant's charge of sexual harassment under Minn. Stat. § 363.03, subd. 1(2)(b) and (c) is hereby DISMISSED WITH PREJUDICE.

Dated this 10th day of November, 1994.

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

I.

Complainant's first charge alleges that she was not given the same opportunity as similarly-situated males to work as a transporter and a jaile Under Minn. Stat. § 363.03, subd. 1(2)(c), it is an unfair employment pract for an employer to discriminate against a person, because of the person's se with respect to the person's terms, conditions, or privileges of employment

In determining whether Respondents engaged in discriminatory practices assigning work to its employees, the analytical process set forth in McDonne Douglas Corp. v. Green, 411 U.S. 792 (1973), must be followed. Sigurdson v Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986). The McDonnell Douglas factors consist of a prima facie case, an answer, and a rebuttal. Once the Complainant makes a prima facie case raising an inference of discrimination, the employer must articulate a legitimate, nondiscriminatory reason for the challenged action. The reason articulated by the employer must "frame the factual issue with sufficient clarity so that plaintiff will have a full and fair opportunity to demonstrate pretext." Sigurdson, supra, 386 N.W.2d at 7 citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252- (1981). Once the employer meets its burden of production, complainant must show that the articulated reason is pretexual or otherwise is not worthy of belief. Hubbard v. United Press International, Inc., 330 N.W.2d 428, 441-42 n.12 (Minn. 1983). The burden of proof remains at all times on the employee Sigurdson, supra, 386 N.W.2d at 720 n.12.

Because McDonnell Douglas dealt with a discriminatory refusal to hire, rather than a discriminatory allocation of available work, the prima facie elements articulated in McDonnell Douglas must be modified. The Administrat Law Judge is persuaded that a prima facie showing of sex discrimination in Respondent's allocation of work to similarly-situated employees consists of following elements:

1. The employee is a protected class member.
2. The employee sought and was qualified for work the employer had available; and
3. Despite the employee's qualifications, she was not given the same opportunities to perform available work given to similarly-qualifi male employees.

Easley v. Northern Shipping Company, 597 F.Supp. 954, 958 (E.D.Pa. 1984).

The Complainant established a prima facie showing. She is woman who wa qualified to work as a transporter, but she was not given the same opportuni to work as male transporters because the Respondents generally assigned male

transporters to transport male prisoners and female transporters to transpo
female prisoners. Likewise, Complainant established a prima facie showing
she was not given the same opportunity to obtain training and work as a jai
that other, male transporters/jailers were given. The discriminatory
assignment of available work is reflected in lower earnings Complainant had
compared to other similarly-situated, male employees, and is evidenced by t
jailhouse policy generally prohibiting female jailers from working in the j
and limiting Complainant's training to work on only three shifts.

The Respondents argued that Complainant had the same opportunities to w as a transporter and a jailer but didn't work as much because she was frequently unavailable for work due to her school commitments and personal schedule. The Administrative Law Judge is not persuaded that Complainant's alleged unavailability fully rebuts Complainant's prima facie case. With respect to training as a jailer, for example, Respondents did not deny that Complainant was only trained to work on a limited number of shifts, and they offered no evidence showing that the shift limitations were based on a bona fide occupational qualification. They did not allege or establish, for example, that being a male was a bona fide occupational qualification for be a jailer on particular shifts.[3] Also, it gave no reason for not assigning Complainant to transport males.

Even if it assumed, however, that the Respondents met their burden of articulating a legitimate, nondiscriminatory reason for limitations on Complainant's opportunity to work, it is concluded that Respondents discriminated against Complainant in distributing available work among similarly-situated employees.

The evidence persuasively establishes that Respondents discriminated against Complainant by generally refusing to offer her work transporting mal prisoners. Wright testified that, whenever possible, male transporters were assigned to transport males and female transporters were assigned to transpo females. Bourasa also told Complainant this policy was in effect. Early in 1989, he told Ferraro that women transporters could not transport men. Lat in 1990, Carlson told her she could not transport men without prior approval from Alvin, even though male transporters did not need such approval. Ferra herself testified that she was only allowed to transport male prisoners from to 2 years after she began working as a transporter and then was only permit to transport male prisoners when a male transporter was unavailable. Becaus more male than female prisoners were transported, Complainant had fewer opportunities to work than her male counterparts. Limiting her opportunity work in this manner was discriminatory and violated the provisions of Minn. Stat. § 363.03, subd. 1(2)(c) (1990).

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3. Although there are contrary holdings based on unique facts, it has usua been held that sex is not a bona fide occupational qualification for wo as a prison guard. See, e.g., Hardin v. Stynchcomb, 691 F.2d 1364 (11t Cir. 1982); Edwards v. Department of Corrections, 615 F.Supp. 804 (M.D Ala. 1985); Gunther v. Iowa State Men's Reformatory, 466 F.Supp. 367 (N Iowa 1979), aff'd, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 960 (1980). See generally, L.Larson, Employment Discrimination, Transfer Binder, § T14.30 at T-106 through T-118 (2d ed. 1994).

At the time Complainant worked as a transporter, state law required a same-sex transporter when a prisoner was moved more than 25 miles from the jail. Respondents have not argued, however, that Complainant wasn't assigne to transport males because of this law and, to the extent that the law appli the jailhouse policy precluded her from transporting males less than 25 mile Hence, to the extent the statute is applicable, Complainant was still the victim of discrimination in cases involving male transports less than 25 mi

In 1989, Ferraro initially spoke to Alvin about transporting males. At that time, he didn't mention the statute or tell her there were any restrictions on her transporting male inmates. On the contrary, he told her would inform the jailers who called for transports that she could transport male prisoners. By July 1991, Complainant had only transported males on tho few occasions when a male transporter was unavailable. At that time, she talked to Alvin once more. He testified that he informed the jailers again that she could transport males, except those few high-risk prisoners who nee an armed escort. This suggests that the Respondents were not considering th distance involved when determining whether Ferraro could transport a male prisoner. If they did, the Complainant's damages might be less, but that is should resolved when damage hearings are held.

The evidence also shows that Ferraro was discriminated against in obtaining work as a jailer. In 1989, when she first inquired about working a jailer, Alvin told her he had no need for jailers then but that she could work in the jail when the need arose. Subsequently, in 1990 three new jaile were hired and when Complainant confronted him, Alvin told her she couldn't work in the jail because the Sheriff didn't want women there. Subsequently, when a new sheriff was elected, Complainant went to Alvin and he agreed to begin her training. However, Alvin and Carlson limited Ferraro's training t three of the five shifts jailers were scheduled to work, and apparently fai to complete her training, even though they had no difficulty completing the training of male jailers, including those who were in school or who worked o seasonal basis.

These acts discriminated against Complainant in obtaining work as a transporter and a jailer. The reduced opportunities for work were based on sex and are reflected in the fewer number of hours she worked compared to th hours worked by similarly-situated male employees (Ex. 12), the Respondent's policies regarding the assignment of work, and the failure to train her for work on all shifts or to complete her training and make work as a jailer available to her on the shifts for which she was trained.

The evidence persuasively establishes that Complainant was readily available to work as a jailer and a transporter. Although she was a full-ti student, many of the courses she took did not involve regularly-scheduled classroom time. Attending school would have some effect on her availability

but the Administrative Law Judge is not persuaded that the disparity in the hours she worked compared to William Houston and Kenton Johnson resulted fr her unavailability or her personal needs. Her personal needs likely would n be much different than the personal needs of all other employees. Furtherm Gene Hill was able to work as a jailer on a full-time basis and accept occasional transports even though he too was a full-time student. Complaina was, in fact, generally available for work. She could be reached 24 hours a day at her residence or by calling the "beeper" she wore when away from the home. If she wasn't home or didn't answer, a message could be left on her answering machine.

To support their argument that Complainant was not readily available fo work, Respondents offered into evidence a transport call log (Ex. 109) cover the period from May 11, 1991 through February 23, 1992. This log shows that transporters were not called on a rotational basis and clearly is not accurate. The log shows that Complainant did not have any transports from October 1, 1991 through February 1992. Complainant's actual time reports (E 127) show that she had transports during that time. Also, during the period from May 1991 through September 1991, the number of transports in Complainan time reports exceed the number listed on Exhibit 109, as summarized in Exhib 111. The Administrative Law Judge is not persuaded, therefore, that Exhibit 109 and 111 reliably support the Respondent's position during the limited period they cover.

Respondent also suggested that Complainant wasn't hired as a jailer and would not, therefore, receive work assignments in the jail. That argument i not credible and must be rejected. Complainant was given training to work i the jail. It is unlikely that she would have been trained to work in the ja if she wasn't going to work there unless, of course, the training Carlson be was a sham. Furthermore, Complainant is listed as a part-time jailer on Cou documents. On Exhibit 31, a "Jail Officer Training Summary for 1990 and 199 list her as a part-time jailer. Likewise, Carlson's letter to Kaske dated March 3, 1992 (Ex. 29) lists as its subject "Laurie Timermanis-Part-Time Jai Officer/Transport." Moreover, the Administrative Law Judge is persuaded tha Ferraro completed the training she needed to work on shifts one, two, and three. The training summary Carlson prepared indicates that she received 12 hours' training in 1990, which was the minimum amount required to work unsupervised in the jail. Only one other part-time jailer received more training. That was Kenton Johnson.

Even if it is assumed, however, that Complainant did not complete all t training necessary to work unsupervised in the jail, the Administrative Law Judge is persuaded that training was deliberately uncompleted so that Complainant would not qualify for work in the jail. Carlson stated that training stopped because either he or she was unavailable. That testimony i unpersuasive. Complainant was generally available and willing to undertake necessary training. Carlson did not feel she should work in the jail and on some occasions, assigned her filing work when she reported for training. Th is no reason why completion of her training would necessarily have interfere with her school schedule, which is highly unlikely, and no reason was given some other FTO could not have completed necessary training. Under the circumstances, the Administrative Law Judge is persuaded that Complainant wa not assigned to work in the jail because she was a women, and if her trainin was uncompleted, it remained uncompleted for that reason.

Respondents also suggested that Complainant never applied to be a part time jailer, implying that such an application is necessary to be hired.

Clearly that was not the case. Many of the positions filled at the County w
filled without formal application by the employee who was hired. Complainan
for example, was hired as a transporter without ever having applied. Hill,
sometime in 1989 or 90, became a permanent part-time jailer at 3/5 benefits
He never applied for that position. It was internally appointed. Furtherm
in spite of her numerous requests for work, she was never told she couldn't
work because she wasn't a jailer, and she was never told an application was
necessary.

Alvin indicated that he began training transport officers so that their services could be used to assist jailers when transporters were waiting to transport a prisoner. That testimony was not persuasive because most part-transporters received little, if any, training, (Ex. 31) and the training ma of them received was insignificant in amount compared to the training given Complainant, Kenton Johnson and William Houston. If Alvin had begun trainin Complainant merely to assist other jailers when she had "down-time" he would have told her so when she asked to get work as a jailer and he began her training. He never did.

Following Ferraro's July and December 1991 letters, neither Alvin nor Kaske undertook any inquiry to determine if male transporters or jailers wer being offered more opportunities to work because they were men. Alvin testified, unpersuasively, that he never considered her complaint as a gende matter. That testimony cannot be credited given the long-standing policy of assigning only males to transport and guard male prisoners.

Alvin's testimony regarding the corrective steps he took in 1989 and 19 also cannot be credited. He said he informed the jailers on both occasions that Ferraro could transport males. However, nobody corroborated his testin and no documentary evidence of his instruction was presented. If it wasn't jailhouse policy to assign males to males, there is no reason why a jailer Bourasa wouldn't know about it. Further, if Alvin had made it known in 1989 that she could transport males, it is unlikely that Carlson wouldn't know ab it or that Alvin would have to repeat himself in 1991.

In sum, the evidence presented persuasively establishes that Respondent staff didn't want women working in the jail or transporting male prisoners, believed they legally couldn't in most cases, and that they limited the numb of opportunities given to Complainant transporting male prisoners or working the jail because she was a woman. As a result of its discriminatory practic Complainant is entitled to appropriate relief under Minn. Stat. § 363.071, subd. 2 (1990).

II.

Complainant has charged Respondents with sexual harassment based on the comments made by various County employees who worked in the jail. It is an unfair employment practice for an employer to discriminate against a person the terms and conditions of the person's employment on the basis of sex. Mi Stat. § 363.03, subd. 1(2)(c). For purposes of this statutory prohibition, word "discriminate", for purposes of discrimination based on sex, includes sexual harassment. Minn. Stat. § 363.01, subd. 14 (1990). Sexual harassmen is defined in Minn. Stat. § 363.01, subd. 41. It states in relevant part, t

harassment includes "verbal or physical conduct or communications of a sexua
nature when":

> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

In order to establish a prima facie case of sexual harassment, the following elements must be established:

1. The employee belongs to a protected group.
2. The employee was subject to unwelcome sexual harassment.
3. The harassment complained of was based on sex.
4. The harassment complained of affected a "term, condition, or privilege" of employment.
5. The employer had actual or imputed knowledge of the harassment and failed to take prompt remedial action.

Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986). In considering these elements, the nature, frequency, intensity, location, context, duration, and object or target of the objectionable language must b considered in determining its effect on female workers. Klink v. Ramsey County, supra, 397 N.W.2d at 901. It must be kept in mind, however, that an employer is not required to maintain a pristine working environment. Continental Can Co., Inc. v. State, 297 N.W.2d 241, 249 (Minn. 1980).

Complainant's sexual harassment charge is based upon approximately elev incidents. Apart from Downs' pat-down gesture, all the incidents involved words. There is no evidence of sexual touchings or requests for sexual favors. Most of the incidents occurred during the last three months of Complainant's employment and some of them were degrading to her or to women general. Some of the comments were sexual in nature: that she could sleep w work-release prisoners; was she getting enough sex; and that the jailer was probably out "banging on his dick." One involved use of the word "fuck." Three related to women generally: that they weren't wanted or shouldn't work the jail, that they can't be trusted, and that woman should be frisked by inserting a finger in the vagina. Three involved Complainant personally: th she was "shacking up", that she was pretty, and that her badge didn't lay flat. The comments in their totality evince harassment.

Complainant argued that the sexual harassment was unwelcome. Unwelcome conduct is sexual conduct which was neither solicited nor incited and which regarded as undesirable or offensive. Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986); Jenson v. Eveleth Taconite Co., 824 F.Supp. 847, 61 F.E.P. 1252, 1278 (D.Minn. 1993). None of the conduct Complainant testified about solicited or incited by her, and she regarded the conduct as demeaning, degrading, undesirable and offensive. She has established, therefore, that conduct she complained about was unwelcome.

Complainant also showed that the unwelcome conduct was based on sex. general rule is that sexual behavior directed at a women raises an inference that the behavior is based on sex. Jenson v. Eveleth Taconite Co., supra, 6 F.E.P. at 1279. Downs' remarks and his pat-down gesture suggested that wome

and Ferraro herself are sexual objects. Houston's stereotypical remark that women can't be trusted was insulting to women and to Complainant. The other comments she complained about also had an explicit sexual meaning. Although one woman testified that Ferraro made a sexual remark in her presence, that remark, even if true, is immaterial. Ferraro didn't make the alleged remark or any other sexual remark, in the presence of male employees. One sexual remark in a consensual setting does not operate as a waiver of one's protections under the Minnesota Human Rights Act. Jenson v. Eveleth Taconite Co., supra, 61 F.E.P. at 1278-79.

Once it is shown that a woman was subjected to unwelcome sexual harassm based on sex, she must also show that the harassment was "sufficiently sever or pervasive to 'alter the conditions of [her] employment and create an abus working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 1 S.Ct. 2399, 2405, 91 L.Ed.2d. 49 (1986), citing Henson v. City of Dundee, 68 F.2d. 897, 904 (11th Cir. 1982). To meet this burden, Complainant must show that the reasonable woman would conclude that the conduct altered the conditions of her employment and created an abusive working environment. Complainant must also show that she was affected like the reasonable woman. Jenson v. Eveleth Taconite Co., supra, at 1280.

As a general rule, the "pervasive use of derogatory and insulting terms relative to women generally and addressed to female employees personally may serve as evidence of a hostile environment." Jenson v. Eveleth Taconite Co supra, 61 F.E.P. at 1276, citing Andrews v. City of Philadelphia, 895 F.2d. 1569, 1485, 54 F.E.P. 184 (3d Cir. 1990). In determining whether the commen made by a variety of Respondent's employees created an abusive working environment, the individual comments made cannot be viewed in isolation. On the contrary, they must be viewed in light of all the circumstances. Based all the circumstances, the Administrative Law Judge is persuaded that the harassment she experiences was not sufficiently severe and persuasive to alt the terms of her employment thereby creating an abusive working environment which caused her separation.

Not all behavior which could be described as "harassment" effects the terms and conditions of employment, however. Meritor, supra, 106 S.Ct. at 2406. To be actionable, the harassment must be sufficiently severe or pervasive to alter one's working conditions and create an abusive environmen Id. In determining if the "harassment" in this case was sufficiently severe pervasive, the nature, frequency, intensity, location, context, duration, an object of the objectionable language must be considered. Klink v. Ramsey County, supra, 397 N.W.2d at 901. Put another way, the totality of the circumstances must be considered. Meritor, supra, 106 S.Ct. at 2407. Some the more specific factors include whether the harassment is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, ____ U.S. _____, 114 S.Ct. 367, 63 F.E.P. 225, 228 (1993). Complainant failed to show that the harassment she experienced was sufficiently severe or pervasive to create an abusive environment.

Most of the remarks weren't severe. Two of them were equivocal, and on was not offensive. Downs and Bourasa once told Complainant they were glad t woman who had previously worked in the jail was gone. Complainant inferred that they didn't want women working in the jail, but they may have had other reasons for this statement. Downs' subsequent actions suggest that he didn want women working in the jail, but at the time the statement was made, his

statement was unclear. Downs and Bourasa once asked Complainant why her bad
didn't lay flat and why the flag was so high on her shirt. Complainant
inferred that she was being singled out for ridicule. However, many jailers
had problems with the fit and tailoring of the uniforms, including the locat
of patches and the construction of the badge holder. Downs' comment to a
prisoner that he had a pretty woman (Complainant) to transport him was
complementary and Complainant's objection to it was that it put her at risk,
not that it was harassing.

One of the comments--that women can't be trusted--was sexually demeanin but it was not directed at Complainant. Rather, it was made in response to television program two jailers were watching. Another comment, that Complainant was "shacking up" apparently was true. Although the slang could characterized as crude, the words do not suggest that Complainant was a whor as she stated they did.

One jailer used the word "fuck" even after Complainant asked him to sto However there is no evidence that he used the word in a sexual context: as surrogate for intercourse. Rather, he apparently used it as mere profanity in reaction to stressful circumstances. The evidence shows that the jail co become quite chaotic at times and that profanities were not uncommon. Given the typical jailhouse environment, a jailers' use of the word was not seriou The jail administrator's remark about Complainant's inability to get into a male's pants when Complainant was discussing her inability to wear uniforms made for males, was an innocuous attempt to be humorous. It too, was not serious.

Four, more serious comments or gestures were made: 1) Downs' gesture on how frisk a woman 2) Downs' suggestion that the Complainant could sleep with male prisoners if stranded at work due to the weather 3) LaValla's statement that another deputy was somewhere "banging on his dick", and 4) Johnson's question if Complainant was getting enough sex.

Downs' gesture and LaValla's comment were patently demeaning and seriou objectionable. Although Downs had also made inappropriate remarks on other occasions, neither LaValla nor Johnson had done so. Complainant might reasonably have concluded that Downs would make other inappropriate comments but there is no persuasive evidence that Johnson or LaValla would be proble

Considering all the comments made, and their relative seriousness, the Administrative Law Judge is not persuaded that they were severe enough to al the conditions of Complainant's employment and create an abusive working environment. Other factors support this conclusion. For the most part, Complainant didn't inform the individuals who used language she found objectionable, that their language was objectionable to her, and she never complained to her superiors about the remarks. If she was seriously offende or outraged, it is unlikely that she would have been as silent as she was. Furthermore, on one occasion, she told a female dispatcher at the jail that way to get back at a male prisoner was to ask him if "it [his penis] comes i an adult size." Complainant denied the statement, but the female dispatcher testimony was more credible. The comment Complainant made suggests that she didn't find all sexual remarks serious.

As a general rule, a finding of sexual harassment cannot be based on isolated incidents. Moylan v. Maries County, supra, 792 F.2d at 749-50 (8th

Cir. 1986); Kotcher v. Ross & Sullivan Appliance Center, Inc., 957 F.2d 59,
(2d Cir. 1982). Hence, it has been held that the frequency of the offensive
conduct must be examined. One court has stated that the "incidents" must be
more than episodic; they must be sufficiently continuous and concerted in or
to be deemed pervasive. Carrero v. New York City Housing Authority, 890 F.2
569, 51 F.E.P. 596, 602 (2d Cir. 1989). Thus, five potentially serious rema
over a three-year period are not enough to establish harassment.
Downes v. FAA, 775 F.2d 288, 39 F.E.P. 70 (Fed. Cir. 1985). In this case, t
remarks made do not meet the threshold for pervasiveness.

All the harassment alleged, except Downs' gesture, involved words. The were no touchings or requests for sexual favors. Offensive words are genera less serious than other forms of harassment. Ross v. Double Diamond, Inc., F.Supp. 261, 270-71, 45 F.E.P. 313 (N.D. Tex. 1987). Furthermore, two women employed at the jail testified that they had experienced no harassment. Although they were not working for most of the time Complainant was employed their experience tends to diminish Complainant's assertion that the environm was poisoned.

Although many of the incidents Complainant mentioned were denied or characterized differently by the individuals who were involved, the Complainant's testimony generally has been credited. She was forthright and credible. Respondents' witnesses, on the other hand, generally were not. many cases, they didn't deny making the statements attributed to them. They said, rather, that they couldn't recall. In crediting Complainant's testimo the allegedly corroborating testimony of VandeKamp and Harmon were not considered in determining if the offensive statements were made.

It is disturbing that most of the sexual comments occurred during the three months of Complainant's employment and came from many sources. Given number of days she worked during the last three months, the number of statements made raise concerns. Nonetheless, based on the entire record, it concluded that the environment was not intolerable and that Complainant hers did not find it intolerable or quit solely because of the sexual statements made.

As the fifth element of her prima facie case, Complainant must show tha the employer had actual or imputed knowledge of the harassment and failed to take prompt, remedial action. The Minnesota courts have refused to adopt a standard of strict liability for sexual harassment by supervisors. Weaver Minnesota Valley Laboratories, Inc., 470 N.W.2d 131, 135 (Minn. Ct. App. 1991). It has also refused to adopt a standard of strict liability for harassment by a coworker. See, e.g. Prescott v. Moorhead State University, N.W.2d 270, 272 (Minn. Ct. App. 1990). In each case, all the underlying circumstances must be considered. The most critical factor in determining employer liability is the existence of a sexual harassment policy. In Kay Peter Motor Co., Inc., 483 N.W.2d 481 (Minn. Ct. App. 1992), the Minnesota Court of Appeals discussed an employer's liability stating:

> . . . appellant contends a victim of sexual harassment should not be allowed to recover absent a complaint to the employer. No reported case has required a complaint where the employer's grievance procedures do not outline a mandatory complaint procedure. See, Bersie, 417 N.W.2d at 294 Lansing J., dissenting (employer not entitled to complaint on harassment perpetrated by supervisors, "particularly if the employer has not established an expressed policy

against sexual harassment or any procedure for resolving harassment claims" (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72-3, 106 S.Ct. 2399, 2408 91 L.Ed.2d 49 [1986]). Compare Heaser v. Lerch, Bates & Assocs., Inc., 467 N.W.2d 833, 835 (Minn. App. 1991) (where manager commits sexual harassment, such knowledge is imputed to employer and absent specific detailed company policy, victim not required to make further complaints) with Weaver v.

Minnesota Valley Lab., Inc., 470 N.W.2d 131, 135 (Minn. App. 1991) (where company has written reporting policy, victim had duty to complain to identified individual in order to preserve sexual harassment claim against company.) In this case, the employer had no express grievance reporting procedure and no policy for reporting wrongful harassment. Moreover, the employer has shown no training program or policy announcements which demonstrate a sincere desire to receive harassment complaints and respond to them.

The existence of a grievance reporting procedure or a policy for reporting wrongful harassment is important because it assures that employers get notic of harassment, indicates that the employer has a sincere desire to eliminate harassment, and gives employees assurances that complaints will be heeded an corrective action taken.

In this proceeding, the employer had a policy against sexual harassment Ex. 30. The policy contained a definition of sexual harassment similar to t contained in the Minnesota Human Rights Act and contained a detailed procedu for reporting harassment. The procedure advised employees to confront the harasser, or, if such a confrontation was believed to be futile, to contact person's supervisor or department head, if they were not the harasser, or th personnel director, the county attorney, or a county commissioner. The poli stated that all complaints would be thoroughly and promptly investigated, th appropriate disciplinary action would be taken, that no reprisal would be ma and that confidentiality would be preserved. Complainant never mentioned an incidents of sexual harassment to Alvin or Kaske. She had seen the sexual harassment policy during training, although she did not have a copy of that policy, one was available to her.

Toward the end of February 1992, allegations of sexual harassment were made in a letter from Complainant's counsel to the county attorney. The cou attorney was one of the individuals identified to receive reports of sexual harassment. The letter is not in evidence, however, and it is unknown if ba allegation of sexual harassment were made or more detailed information was provided. On February 29, 1992, Kaske talked to Complainant on the telephon after he learned that a sexual harassment complaint had been made. He had n seen the letter, and Complainant failed to discuss her allegations with him Two days later, Complainant left her employment indefinitely.

Kaske's knowledge about his statements can be imputed to the Respondent McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984). However, the stateme made by coworkers cannot. There is no evidence that her complaints about th remarks or conduct was ever brought to the Respondents' attention. Complain testified that she did not mention their sexual remarks to her supervisors because they had never done anything to help her when she complained about h hours. In Tru Stone Corporation v. Gutzkow, 400 N.W.2d. 836 (Minn. Ct. App 1987), the court held that an employee has no duty to inform his employer of

continuing harassment where the employee notified the employer that he was being harassed but received no real expectation of assistance. The Administrative Law Judge is not persuaded, however, that her inability to obtain more work after complaining to Alvin and Kaske freed her of her statutory obligation to report the harassment endured. Complaints of harassment are fundamentally different than Respondent's complaints about getting enough work and likely would be received and handled differently.

Although Kaske had made inappropriate remarks to Complainant, she was not required to bring her complaints to him and ultimately didn't. She failed t show, however, precisely when the complaint to the County Attorney was made precisely what her complaints were. She also failed to established what ste if any, the County Attorney took after receiving notice of her complaints an failed to show that Respondents did not take prompt corrective action. Hen the Administrative Law Judge is persuaded that Complainant failed to establi the final element of her prima facie case. For that reason and those previously mentioned, her charge of sexual harassment must be dismissed. Th reasonable woman would not have found working conditions intolerable.

III.

Complainant's last charge against Respondents is that Kaske retaliated against her because she retained legal counsel who sent a letter to the Cour Attorney alleging sexual discrimination and sexual harassment. Under Minn. Stat. § 363.03, subd. 7, it is an unfair discriminatory practice for an employer to intentionally engage in any reprisal against any person because that person:

> (1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this chapter. . . .
>
> ***
>
> A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment.
>
> ***

A prima facie showing of retaliation generally requires the employee to show that she engaged in protected activity, was subsequently the subject of some adverse action by the employer, and that there is a causal link between the activity and the adverse action. The causal link can be established by showing that the employer was aware of the protected activity and that adver action followed within such a period of time that a retaliatory motive can b inferred. Hubbard v. United Press International, Inc., 330 N.W.2d 428, 444 (Minn. 1983); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 101 S.Ct. 1613 (1981); Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 318 (D.Mass.), aff'd, 545 F.2d 222 (1st Ci 1976). A discriminatory motive also can be inferred from an employer's awareness of the protected activity in some other evidence tending to show a retaliatory motive.

Complainant showed that she "opposed a practice" forbidden by the Minnesota Human Rights Act when her attorney notified the County Attorney th she had been sexually harassed and discriminated against on the basis of her sex. In Owens v. Rush, 24 F.E.P. 1543, (D.Kan. 1979), the court held that a employee who sent a letter to a board of county commissioners complaining of

discriminatory pay had engaged in "opposition" for purposes of the prohibiti against reprisals in the Civil Rights Act of 1964. In the same case, it was held that a plaintiff's visit to her attorney concerning her intent to file complaint was protected.

The courts have held that retaliation can take many forms and includes interrogation. Paxton v. Union National Bank, 686 F.2d. 552, 29 F.E.P. 1233 (8th Cir. 1982). On March 2, when Ferraro reported to do a transport, Kaske who was present at the time, began asking Ferraro questions in the presence two jailers. First, he asked her where the call-out records were and implie that she had taken them. Then, he began asking her a number of questions ab work and her training. Even though she indicated that she still felt uncomfortable talking to him, he asked her how she expected him to resolve t matter if she wouldn't talk about it. He also asked whether the letter constituted an intention to file a lawsuit or whether a lawsuit had already been filed. She told him it was lawsuit. He continued to question her, but she didn't answer, and she left to perform her transport. He returned later and read some regulations to her and told her that she couldn't work the fir and fifth shifts because no one else was on duty and told her the situation not of his doing. Ferraro was very upset when she left the jail with her transport and cried on her way back. She had been caught off-guard by Kaske questions and embarrased because he had questioned her in front of coworkers She became physically sick over the incident and never returned to work. Th Administrative Law Judge is persuaded that Kaske's confrontation on March 2 retaliatory. Although he denied raising his voice, Ferraro's testimony on t point was more credible. Furthermore, confronting her about the missing log and suggesting that she took them in front of other employees evinces a retaliatory motive. Ferraro had previously told him she did not want discus her hours or the sexual harassment mentioned in her attorney's letter with him. Nonetheless, on March 2, he began questioning her again. His decision question her again, knowing she did not want to speak to him, his questionin her in front of other employees, his rapid-fired questions, and his anger an loud speech were retaliatory. Paxton, supra, 688 F.2d at 572.

The Administrative Law Judge is not persuaded, however, that Kaske's confrontation with her on March 2 resulted in a constructive discharge. An employee is "constructively discharged" if forced to quit by intolerable working conditions. The majority rule is that constructive discharge depend on whether an employer made working conditions so difficult a reasonable per in the same position would feel compelled to resign. The Minnesota Supreme Court has adopted a similar test. In Continental Can Co., Inc. v. State, 29 N.W.2d 241, 251 (Minn. 1980) it stated:

> A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination.

Accord: Derr v. Gulf Oil Corp., 796 F.2d 340, 344, 41 F.E.P. 166, 169 (10th Cir. 1986).

Complainant failed to show that she was constructively discharged becau of the single confrontation with Kaske, whom the Administrative Law Judge do not believe was attempting to force her resignation. Also, the Administrati Law Judge is not persuaded that Kaske's remarks rendered her working conditi so difficult that a reasonable person in her position would have felt compel to resign.

JLL